**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**ORDINARY ORIGINAL CIVIL JURISDICTION**

**WRIT PETITION NO.2239 OF 2002**

Gopal Shankar Pawar .. Petitioner

versus

Bhartiya Arogyanidhi Gen.Hospital .. Respondent

Mr.N.M.Ganguli for Petitioner

Mr R.L.Nerlekar for Respondent

**CORAM : D.G. KARNIK, J**

**DATED : 26th July, 2005.**

**P.C.**

1. By this petition the petitioner-employee challenges Part I of the Award dated 14th December, 2001 and Part II of the Award dated 25th January, 2002 passed by the Labour Court Mumbai dismissing the reference under section 10 of the Industrial Disputes Act and refusing to set aside the order of dismissal of the petitioner from service.

2. The petitioner was employed initially as a ward

boy/peon in the respondent hospital. In the year 1982, the petitioner was promoted as a Mukadam. On 10th October, 1988 a show cause notice cum charge sheet was issued to the petitioner alleging several acts of misconduct, whichare summarised below :

i) The petitioner had taken an amount of Rs.400/- from the hospital through Ganpat Tandle in order to meet the ambulance charges for shifting the dead body of a patient who was a friend of the petitioner. On the next day the petitioner submitted a receipt to the hospital for having spent a sum of Rs.425/-. Investigations revealed that the petitioner had actually paid a sum of Rs.225/- only but had submitted a false, fabricated and forged receipt for Rs.425/-. The petitioner had thus misappropriated an amount of Rs.175/- out of the advance amount given to him ;

ii) In the Duty Allocation Register/Duty Charts the petitioner had been including the names of some of the employees who were dismissed from service during the month of August 1987;

iii) On account of the irregularities committed by the petitioner in the preparation of the duty charts duties of the petitioner were transferred and allotted to Mr.Prabhudas Sheth a senior clerk cum supervisor with effect from 4th November, 1988. On 5th November, 1988 at the instance of the petitioner one Anthony (outsider) accosted Prabhudas Sheth and threatened him not to do the work of others failing which his leg would be broken;

(iv) On 7th November, 1988 the petitioner threatened Prabhudas Sheth that he would be beaten up if he took over the duties of the petitioner ;

v) The petitioner did not over the badli workers cards to Prabhudas Sheth though

demanded with the result that written orders were required to be issued ;

(vi) At the instance of the petitioner two persons again threatened/assaulted Prabhudas Sheth on 1st and 6th December, 1988;

Mr J.B.Dholkia was appointed as an enquiry officer to enquire into the charges against the petitioner. After giving an opportunity to the parties of adducing evidence and after recording of the evidence the Enquiry Officer by his report dated 19th June, 1989 held that the charge of threatening Prabhudas and assault allegedly taken place on 5th November, 1988, 1st December, 1988 and 6th December, 1988 were not proved. The Enquiry Officer however held that other charges were proved. In particular he held that the petitioner had misappropriated a sum of Rs.175/- from out of the advance of Rs.400/- paid to him. He also held that the petitioner had wrongly included the names of the employees inthe Duty Chart who were dismissed and had disobeyed orders of the management not to include them in the Duty Register. He also held as proved the charge that the petitioner had threatened Prabhudas Sheth on 7th November, 1988. On considering the report of the enquiry officer and after considering the past

record of the petitioner the Medical Director of the respondent hospital by an order dated 4th July, 1989 dismissed the petitioner from service. The petitioner then approached the government which made the reference under section 10 of the Industrial Disputes Act. After hearing the parties by an award Part I dated 14th December, 2001 the Labour Court held that the enquiry was fair and proper and in accordance with the principles of natural justice. It also held that the findings of the Enquiry Officer were not perverse and thereafter fixed the matter for further hearing on rest of the issues. Thereafter the petitioner examined himself on oath but did not examine any other witness. The respondent did not examine any witness. After considering the evidence adduced by the petitioner by an Award Part II the Labour Court held that the impugned punishment was not harsh or disproportionate to the misconduct and that the petitioner was not entitled for reinstatement. Both these awards are impugned in this petition.

3. Learned counsel for the petitioner contends that the findings recorded by the enquiry officer are not only erroneous but perverse. The

petitioner has not annexed to the petition copies of the evidence recorded before the Enquiry Officer. The petitioner has also not filed any compilation of the documents or compilation of the evidence. No material is brought before me to show that the enquiry officer did not consider any relevant evidence produced before him. Learned counsel is also unable to show that the the findings of the enquiry officer are such that no reasonable tribunal or person could have reasonably reached those findings on the basis of the evidence brought before him. In the circumstances the submission of the learned counsel for the petitioner that the findings of the enquiry officer are perverse has to be rejected.

4. Learned counsel for the petitioner then submits that after the findings of the enquiry officer recording the guilt of the petitioner the respondent should have been given a second show cause notice to the petitioner before passing the order of dismissal. He invites my attention to clause (6) of Model Standing Orders No.25 applicable to the petitioner, which reads thus :

" In awarding punishment under the standing

> order the management shall take note of the gravity of the misconduct, previous record if any of the workmen and any other extenuating or aggravating circumstances that may exist. "

5. Learned counsel for the petitioner submits that the fact that the employer is required to take into consideration the previous record as also other extenuating or aggravating circumstances that may exist before awarding of the punishment would require that opportunity to show cause must be given to the petitioner to show his past record and also to show extenuating circumstances, if any, before awarding the punishment. It is not enough for the management to take into consideration past record of an employee but a specific notice must be issued to the employee pointing out the past record which the employer wishes to take into consideration and also offer to the employee an opportunity to show what are the extenuating circumscees. He submits that since second the show cause notice was not issued to the petitioner he was denied reasonable opportunity of showing cause and clause 6 of the standing order no.25 was thus been violated. In support of this contention learned counsel for the petitioner refers to and relies upon a decision of the Supreme Court in

State of Mysore vs Manche Gowda reported in AIR 1964 SUPREME COURT 506 and a decision of this Court in Borosil Glass Silk Works Ltd vs M.G.Chitale and Richard M.D'Souza reported in 1974 2 LLJ 184.

6. In State of Mysore vs K.Manche Gowda (supra) the Constitution Bench of the Supreme Court was concerned with the validity of dismissal of a government servant. While interpretating the provision of Article 311 (2) of the Constitution of India the Supreme Court held that the government servant must have a reasonable opportunity not only to prove that he was not guilty of the charges levelled against him but also to establish that the punishment to be imposed was either uncalled for or excessive. The opportunity has to be a reasonable opportunity and therefore it was necessary that the government servant must be told the grounds on which it was proposed to take such an action. The court therefore held that the opportunity to show cause against the proposed punishment included pointing out of the record of the previous punishment in the second show cause notice to be issued to him.

7. In Borosil Glass Silk Mills vs M.G.Chitale and Richard D'Souza (supra) this Court on facts of that case held that while passing of an order of dismissal the employer had not taken into consideration the very relevant and material facts which ought to have been considered under the Model Standing Order No. 25 (6) before awarding the punishment and therefore the standing order No.25 (6) was violated. It held that the model Standing Order formed part of the statutory terms and conditions of service between the industrial employer and employees which were breached. The court therefore upheld the order of the tribunal rejecting the approval under section 33 (2) (b) of the Industrial Disputes Act.

8. Learned counsel for the respondents submits that there is no law that a second show cause notice should be given to the employee along with a copy of the Enquiry Officer's report before passing an order of dismissal. He further submits that what is required to be done under clause 6 of the Model Standing Order No. 25 is to consider the gravity of the misconduct, previous record if any of the workman and extenuating or aggragating

circumstances that may exist, before passing of the order of dismissal by way of punishment. He submits that it is not necessary to issue second notice after the enquiry officer's report giving an opportunity to the employee to explain the previous conduct or extenuating or aggragating circumstances and they may be taken into consideration by the employer without giving any notice to the employee before passing an orer of dismissal. In support of his submission learned counsel for the respondents relies upon a decision of the Supreme Court in Management Shahdara (Delhi) Saharanpur Light Railway Co.Ltd vs S.S.Railway Workers Union reported in AIR 1969 SUPREME COURT 513 and two decisions of this court rendered in Hawaldar Singh vs Taigrania Metal & Steel Industries & ors reported in 2000 II CLR 452 and Ratnakar Samuel Gaikwad vs J.G.Glass Industries Ltd, Pune reported in 2002 I CLR 590 and also a decision of the Punjab and Haryana High Court in Balwant Singh vs New Sutlej Transport Co (P) Ltd reported in 1989 II LLJ 217.

9. In my view the ratio of the decision of the Supreme Court is applicable only in respect to the

government servants and not the industrial workers. The distinction is clearly brought out in the subsequent decision of the Supreme Court. In Management Shahdara (Delhi) Saharanpur Light Railway Co.Ltd vs S.S.Railway Workers Union (supra). Shelat, J speaking for the majority observed in para 18 of the judgment:

> " As regards the modification requiring a second show cause notice, neither the ordinary law of the land nor the industrial law requires an employer to give such a notice. In none of the decisions given by Courts or the tribunals such a second show cause notice in case of removal has ever been demanded or considered necessary. The only class of cases where such a notice has been held to be necessary are those arising under Article 311. Even that has now been removed by the recent amendment of that Article. To import such a requirement from Article 311 in industrial matters does not appear to be either necessary or proper and would be equating industrial employees with civil servants. In our view, there is no justification on any principle for such an equation. Besides, such a requirement would unnecessarily prolong disciplinary enquiries which in the interest of industrial peace should be disposed of in as short a time as possible. " (Emphasis supplied)

10. In Hawaldar Singh vs Taigrania Metal & Steel Industries & ors (supra) learned Single Judge of this Court while rejecting the contention that the order of dismissal was bad in law because a second show cause notice to show cause against the

punishment was not issued before passing of order after receipt of the Enquiry Officer's report :

> " The third ground on which the enquiry is assailed by the learned Advocate for the petitioner is that a copy of the report or the findings of the enquiry officer was not furnished to the petitioner, and therefore he had no opportunity to make a representation to the employer i.e. the respondent company on the point of punishment. The learned Advocate did not or could not point out any standing order or rule to the effect that a copy of the report or findings of the enquiry officer should be furnished to the delinquent workman before an order of dismissal was passed. In any case, there is no such law that a second show cause notice before dismissal should be given along with a copy of the enquiry officer's report of findings. I therefore, do not find any substance in this contention also. "

11. In Ratnakar Samuel Gaikwad vs J.G.Glass Industries Ltd, Pune & anr another Single Judge of this court rejected a similar contention that the order of dismissal was vitiated on account of non issuance of a second show cause notice after receipt of the enquiry officer's report and before passing of the order of dismissal. The court held that the employer had considered the past service record to determine whether there were any extenuating circumstances due to which lesser punishment than of dismissal could be imposed. That was enough and it was not necessary to give

the employee an opportunity to show cause before passing the order of dismissal.

12. In Balwant Singh vs New Sutlej Transport Co (P) Ltd (supra) a similar contention on behalf of the workmen was rejected and it was held that it was well settled law that it was not requirement of law that a second show cause notice regarding the proposed punishment be served upon the delinquent workmen.

13. Two learned Judges of this court in cases rendered to above have taken a view that it is not necessary to issue a second show cause notice after the enquiry officer’s report to the workman to show cause why punishment of dismissal should be imposed on him. It would be enough if the employer before passing of the order considered the previous record of the employee and whether their existed any extenuating circumstances. I am in respectful agreement with the views expressed therein.

14. In the present case, the respondent employer has taken into consideration the previous record of the employee. The dismissal order specifically

says that the employer had gone through the past record of service and he did not find anything extenuating deserving consideration in the employes's favour warranting a lenient view. Thus the requirement of clause 6 of model standing Order no. 25 was applied and no fault can be found with the order.

15. It is well settled position in law that while deciding a reference under section 10 of the I.D.Act where an employee has been dismissed after enquiry and the court comes to the conclusion that the enquiry is fair and proper and the court does not sit in judgment as the appellate court while considering the findings of facts recorded by the enquiry officer. The findings reached by the Enquiry officer cannot be set aside unless they are not supported by the evidence or are perverse in a sense that no man acting reasonably would have reached those findings on the basis of the evidence on record. In the present case, the enquiry was held to be fair and proper. The findings were also held to be not perverse. Nothing is shown to me from the record to show that the findings are perverse.

16. Lastly learned counsel for the petitioner submits that the punishment was disproportionate to the misconduct and therefore should be set aside. The charge of fraud is a serious charge. It is also to be noted that a false receipt was prepared to show higher charges were paid to a hearse carrier. The petitioner wanted to make profit even of death of his own neighbour. Secondly the petitioner disobeyed lawful orders of the management and included the names of the dismissed employees while preparing the duty charge. When on account of this work of preparing of duty chart was allotted to other employees the petitioner threatened that employees. All the charges proved are of serious nature and the punishment awarded cannot be said to be disproportionate or excessive considering the nature of the charges. In the circumstances, there is no merit in the petition which is hereby dismissed with costs. Rule is discharged with costs.

D.G.KARNIK, J